Internal Revenue Service

memorandum

CC:INTL-0751-94
Br1:WEWilliams

date: MAY - 3 1995

to: Manager, Group 1113 IN:C:E:668
Assistant Commissioner (International)

from: Chief, Branch No. 1
Associate Chief Counsel (International)

subject: Taxpayer: [redacted] - Article 17 of the U.S.-U.K. Income Tax Convention

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This responds to your memorandum dated August 11, 1994, in which you request advice regarding the characterization under the United States-United Kingdom Income Tax Treaty[1]/ of income paid to a non-resident alien for his appearances in television commercials produced and aired in the United States.

ISSUE

Whether income paid to a nonresident alien by a United States corporation for his appearance in television commercials, and training films, produced and aired in the United States, is income from personal activities described in Article 17 (Artistes and Athletes) of the Convention?

Background

[redacted], the taxpayer, is a citizen and resident of the U.K. He is a well-known stage, television, and movie actor in both the U.K. and the U.S., [redacted]

[1]Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains (hereinafter referred to as "the Convention").

[redacted]. During the past several years, he has appeared in television commercials for electronic products produced by [redacted]. The income he derived for his appearances in these commercials is the subject of this examination.

In a contract dated [redacted], taxpayer's employer, agreed to provide taxpayer's services to [redacted] as agent for [redacted]. [redacted], a foreign corporation, agreed to provide taxpayer's services for the production of [redacted] television commercials, up to [redacted] printed advertisements, and up to [redacted] sales films to be shown at sales conferences. [redacted] also agreed, at [redacted] option, to provide taxpayer's services for the production of up to [redacted] commercials.

The initial term of the contract was [redacted] months with an option by [redacted] to renew for an additional [redacted] months. During the initial term, [redacted] agreed to pay taxpayer $[redacted] for the television commercials and their use during this term and an additional $[redacted] for the making and use of the non-television material. During the optional term, Backer agreed to pay taxpayer $[redacted] for the making and use of television commercials and an additional $[redacted] for the making and use of non-television material.

DISCUSSION

1. Taxpayer's position

It is taxpayer's position that the income he earned from appearing in the [redacted] TV commercials and training films in [redacted] and [redacted], the [redacted] years under examination, is not income from activities described in Article 17 of the Convention.

If the income is not from an activity described in Article 17, it is from either independent personal services or from dependent personal services. You have advised us that taxpayer was in the U.S. during [redacted] and [redacted] for [redacted] days and [redacted] days respectively; and that taxpayer argues that the income is exempt under Article 14 (Independent Personal Services) of the Convention.

Article 14 provides that income from services of an independent nature performed by a resident of the U.K. may be taxed by the U.K. Such income may also be taxed by the U.S. if:

(a) the recipient is present in the U.S. for a period exceeding in the aggregate 183 days in the tax year concerned; or

(b) the individual has a fixed base regularly available to him in the U.S. for the purpose of performing his activities.

2. Treaty provisions

Article 17(1) (Artistes and Athletes) of the Convention provides as follows:

> (1) Notwithstanding the provisions of Article 14 (Independent Personal Services) and 15 (Dependent Personal Services), income derived by entertainers, such as theatre, motion picture, radio, or television artistes, and musicians, and by athletes, from their personal activities as such may be taxed in the Contracting State in which these activities are exercised, except where the amount of the gross receipts derived by an entertainer or athlete, including expenses reimbursed to him or borne on his behalf, from such activities do not exceed 15,000 United States dollars or its equivalent in pounds sterling in the tax year concerned. [Emphasis added.]

The Senate Foreign Relations Committee Report contains the following with respect to Article 17:

> The proposed treaty contains a separate set of rules which govern the taxation of income earned by public entertainers (such as theater, motion picture, radio or television entertainers and musicians) and athletes. The proposed treaty provides that, notwithstanding the other provisions dealing with the taxation of personal services (Articles 15 and 16), each country may tax nonresident entertainers or athletes on the income from their personal services performed in the country during any year in which their gross receipts (including reimbursed expenses or expenses borne on their behalf) for services performed in that country during that year exceed $15,000. [Emphasis added.]

Article 17(1) of the Convention is almost identical to Article 17(1) of the 1977 OECD Model Income Tax Convention, which is as follows:

> 1. Notwithstanding the provisions of Articles 14 and 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as an athlete, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State.

A Report (The Taxation of Income Derived From Entertainment, Artistic and Sporting Activities) dated December 1, 1986, by Working Parties No. 1 and 8 of the OECD Committee on Fiscal Affairs, includes the following with respect to Article 17(1) of the OECD Model:

> 68. As far as "artistes" are concerned, it was noted that paragraph 1 of the Article included examples of persons who would be regarded as such. However, these examples should not be considered as exhaustive. It was agreed that it was not possible to give any precise definition of "artiste", and that a wide variety of situations could arise. On the other hand, the term clearly includes the stage performer, film actor, actor (including for instance a former athlete) in a television commercial. Article 17 may also apply to artistes and athletes participating in activities which are of a political, social, religious or charitable nature, if an entertainment character is present. On the other hand, conference lecturers and persons interviewed on television are clearly not "artistes" in the meaning of Article 17. There is however a variety of intermediate situations where say, appearance on television or in public could generally be seen as "acting" for entertainment purposes, thereby falling under Article 17. In this grey area, it is necessary to review the overall balance of the activities of the person concerned. [Emphasis added.]

The U.S. follows the 1986 Report on artists and athletes. An IRS summary prepared for a Group of Four Meeting contains the following concerning the definitions of "artiste" and "athlete":

> The United States defines "artiste" and "athlete" in accordance with the OECD report, The Taxation of Income Derived From Entertainment, Artistic and Sporting Activities.

* * *

> Generally, the United States has not had problems with the definitions of "artiste" and "athlete". Occasionally, however, an entertainer or athlete will argue that his or her activities were not in the nature of a public performance. For instance, actors who appear in television commercials will argue that their television activities are not within the scope of an Artistes and Athletes article. This argument has been rejected. [Emphasis added.]

Therefore, the position of the U.S., and that of the OECD, is that appearance in commercials is "public entertainment" and the income derived therefrom is normally covered by the artists and athletes article of the tax treaties.

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For example, Article 17(1) of the U.S.-Germany Income Tax Convention, that entered into force in 1991, is nearly identical to Article 17(1) of the U.K. Convention. Article 17(1) of the German treaty is as follows:

> Notwithstanding the provisions of Articles 7 (Business Profits), 14 (Independent Personal Services), and 15 (Dependent Personal Services), income derived by a resident of a Contracting State as an entertainer (such as a theater, motion picture, radio or television artiste, or a musician), or as an athlete, from his personal activities as such exercised in the other Contracting State may be taxed in that other State, except where the amount of the gross receipts derived by such entertainer or athlete, including expenses reimbursed to him or borne on his behalf, from such activities does not exceed $20,000....

The Treasury Department's Technical Explanation of Article 17 of the German treaty includes the following:

> Income derived from a Contracting State by an entertainer or athlete who is a resident of the other Contracting State in connection with his activities as such, but from other than actual performance, such as royalties from record sales and payments for product endorsements, is not covered by this Article, but by

> other articles of the Convention, as appropriate .... [Emphasis added.]

See also the Treasury Department's Technical Explanation of Article 18 of the U.S.-Netherlands Income Tax Convention which states that the Artistes and Athletes Article does not cover income from product endorsements.

On the other hand, Article 18(1) of the U.S.-Mexico Income Tax Convention includes income from endorsements as entertainment income covered by the artistes and athletes article. However, this result follows from paragraph 16 of a Protocol that was ratified by the Senate on the same day that the treaty with Mexico was ratified. Paragraph 16 of the Protocol

> clarifies that for purposes of ... [Article 18 of the treaty], remuneration derived by an entertainer or athlete who is a resident of one of the countries would include remuneration for any personal activities performed in the other country relating to that person's reputation as an entertainer or athlete (such as compensation for services performed in personal endorsements of commercial products). [Emphasis added.] [2/]

We also note that prior to its repeal in 1990, section 48(k)(1)(A) provided that a credit was allowable under section 38 to a taxpayer with respect to any motion picture film or video tape (i) only if such film or tape is new section 38 property which is a qualified film, and (ii) only to the extent the taxpayer had an ownership interest in such film or tape.[3/] Section 48(k)(1)(B) defined "qualified film" as

> any motion picture or video tape created primarily for use as public entertainment or for educational purposes. [Emphasis added.]

[2/] The Treasury Department's Technical Explanation states that "[a]s explained in point 16 of the Protocol, such remuneration includes remuneration for personal activities relating to the individual's reputation as an entertainer or athlete, such as compensation for services performed in personal endorsements of commercial products.

[3/] Section 48(k) was repealed by P.L. 101-508, § 11813 (1990), effective for property (films) placed in service after December 31, 1990.

Section 1.48-8(a)(3)(ii) of the Regulations provided that a film or tape was created primarily for use as a public entertainment only if created principally for public exhibition for the amusement, enlightenment, or gratification of an audience. A film or video produced for educational purposes was one intended for use by a school, public library, or governmental agency.[4/]

In Rev. Rul. 82-79, 1982-1 C.B. 8, a limited partnership planned to purchase master video tapes dealing with topics in the field of critical care medicine. The partnership intended to have copies reproduced from the master tapes and to market the copies to physicians, allied health personnel, hospitals, medical groups, technicians, etc. The question was whether an investment tax credit could be claimed with respect to the master tapes. The revenue ruling holds that the master tapes do not qualify for an investment tax credit. The copies are not produced for entertainment nor will they be used in educational institutions, libraries, or by governmental agencies. The revenue ruling observes that "advertisements and industrial training films and tapes do not qualify for the credit."

Conclusions

[redacted] the income derived by [redacted] from the [redacted] commercials is income covered by Article 17 of the U.K. Convention. This is the position taken by Treasury with respect to the corresponding and essentially identical article in the OECD Model Income Tax Convention.

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[4/] Treas. Reg. § 1.48-8(a)(3)(ii) was repealed by T.D. 8474, 1993-1 C.B. 242, effective April 27, 1993.

If you have any further questions, please call Ed Williams at 874-1490.

GEORGE M. SELLINGER